

November 9, 2012

Stephen J. Crooke
3 Flintridge
Irvine, CA 92603

Re: Your Request for Informal Assistance
Our File No. I-12-146

Dear Mr. Crooke:

This letter responds to your request for advice regarding the revolving door provisions of the Political Reform Act (the “Act”).¹ Because you are not requesting advice regarding any particular decision before your former agency, we can only offer you informal assistance. Informal assistance does not confer the immunity provided by a Commission opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion of the application, if any, of other post-governmental employment laws that may apply.

QUESTIONS

(1) As a former employee of the Department of Fish and Game (the “DFG”), what restrictions do the Act’s revolving door provisions have on your ability to work as a paid employee or volunteer of the Sportsfishing Association of California (the “SAC”)?

(2) While you were officially terminated on August 29, 2012, the last day you worked for the DFG was June 22, 2012. On which date does the one-year ban commence?

CONCLUSIONS

(1) As a former state employee, the Act’s permanent and one-year bans apply to you. Under the permanent ban, you are prohibited from *ever* participating in proceedings involving

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

specific parties and the State of California, or assisting others in the proceeding, for compensation if you previously participated in the proceeding as a state employee.

Under the one-year ban, you are prohibited from making an appearance or communication before the DFG or the Fish and Game Commission (the "FGC"), for compensation, on behalf of the SAC for one year from the date you left state service if that contact is made for the purpose of influencing an administrative or legislative action or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. Nonetheless, the one-year ban does not bar you from working for the SAC as a paid employee, including serving as their representative to the Ground Fish Advisory Panel, so long as you do not make an appearance or communication in a proceeding before the DFG or FGC.

Additionally, the one-year ban does not prohibit you from working on behalf of the SAC as a volunteer. However, we caution that you are not considered a volunteer if you have been "promised compensation" including, but not limited to, an offer or promise of future employment with the SAC. Compensation does not include payments made for necessary travel, meals and accommodations received directly in connection with your volunteer services.

(2) Since you were no longer authorized to perform the duties of your employment as of June 22, 2012, the one-year ban commences on this date and will expire on June 22, 2013.

FACTS

You worked for the DFG until your retirement in November 2005. You were rehired as a retired annuitant on July 1, 2007, but your position was terminated in August of this year. In your work as a retired annuitant, you provided advice on biological sampling and made recommendations to the DFG staff regarding legislation and rule making for the FGC and the Pacific Fishery Management Council (the "PFMC"), which is a federal agency equivalent to the FGC. While the DFG officially terminated your position on August 29, 2012, the last day you worked was June 22, 2012. As an employee of the DFG, both your permanent position and retired annuitant position were designated positions under the DFG's conflict-of-interest code.

You have been offered a position with the Sportsfishing Association of California. They would like you to provide advice on California and federally managed fish species, represent them at meetings and regulatory hearings, and sit on a seat they have on the Groundfish Advisory Panel of the PFMC.

ANALYSIS

The Act has three restrictions on state officials who are considering leaving or have left state service known as the revolving door provisions:

(1) A ban on influencing decisions involving a prospective employer (Section 87407);

(2) A “permanent ban” barring a state employee from “switching sides” in certain proceedings involving the state and another party that the employee previously participated in as a state employee (Sections 87400-87405); and

(3) A “one-year ban” prohibiting a state employee from making an appearance or communication before his or her former agency to influence the agency’s administrative or legislative action or an acting involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property (Section 87406).

Because your questions relate only to the “permanent ban” and “one-year ban,” we limit our discussion to those areas.

Permanent Ban on “Switching Sides”

Sections 87401 and 87402 (the “permanent ban”) prohibit a former state employee from “switching sides” and advising or representing any person for compensation in certain proceedings involving the State of California if the employee previously participated in the proceeding while in state service. Specifically, Section 87401 provides:

“No former state administrative official, after the termination of his or her employment or term of office, shall for compensation act as agent or attorney for, or otherwise represent, any other person (other than the State of California) before any court or state administrative agency or any officer or employee thereof by making any formal or informal appearance, or by making any oral or written communication with the intent to influence, in connection with any judicial or quasi-judicial or other proceeding if both of the following apply:

“(a) The State of California is a party or has a direct and substantial interest.

“(b) The proceeding is one in which the former state administrative official participated.”

Moreover, Section 87402 provides that you may not assist or advise others with regard to proceedings in which you are disqualified under Section 87401.

The permanent ban is a lifetime ban that applies when an official has permanently left or takes a leave of absence from any particular office or employment. (Regulation 18746.1(a)(1).) The permanent ban applies to any “judicial, quasi-judicial or other proceeding” in which you participated while employed at the DFG. For purposes of the permanent ban, a judicial, quasi-

judicial or other proceeding is defined as “any proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties in any court or state administrative agency. . .” (Section 87400(c).)

As a former employee of the DFG you are subject to the permanent ban. However, you have not identified any specific proceeding in which you previously participated as an employee of the DFG. Accordingly, we cannot offer you any additional advice regarding the permanent ban outside of the general assistance provided above. If you need additional assistance regarding the permanent ban, you should seek additional assistance describing the proceeding in which you wish to participate and the extent of your past involvement.

One-Year Ban

The one-year ban prohibits a state employee from making, for compensation, any formal or informal appearance, or making any oral or written communication, before his or her former agency for the purpose of influencing any administrative or legislative actions or any discretionary act involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property. (See Section 87406; Regulation 18746.1.)

The one-year ban applies to any employee of a state administrative agency who held a position that is designated or should be designated in the agency’s conflict-of-interest code. (Section 87406(d)(1); Regulation 18746.1(a)(2).) The ban applies for twelve months from the date the employee leaves state office or employment, which is defined as the date the employee permanently leaves his or her governmental agency or takes a leave of absence. (See *Lowry* Advice Letter, No. I-08-053; Regulation 18746.1(b)(1) and (2).)

While in effect, the one-year ban applies only when a former employee or official is being compensated for his or her appearances or communications before his or her former agency on behalf of any person as an agent, attorney, or representative of that person. (Regulation 18746.1(b)(3) and (4).)

In contrast to the permanent ban, which only applies to “judicial or quasi-judicial” proceedings, the one-year ban applies to “any appearance or communication made for the purpose of influencing administrative or legislative action or influencing any action or proceeding involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property.” (Regulation 18746.1(b)(5).)

An appearance or communication is for the “purpose of influencing” if it is made for the “principal purpose of supporting, promoting, influencing, modifying, opposing, delaying, or advancing the action or proceeding.” (Regulation 18746.2.) An appearance or communication includes, but is not limited to, conversing by telephone or in person, corresponding in writing or by electronic transmission, attending a meeting, and delivering or sending any communication.

(*Ibid.*)

Finally, appearances and communications are prohibited only if they are (1) before a state agency that the public official worked for or represented, (2) before a state agency which budget, personnel, and other operations are subject to the control of a state agency the public official worked for or represented, or (3) before any state agency subject to the direction and control of the Governor, if the official was a designated employee of the Governor's office during the twelve months before leaving state office or employment. (Regulation 18746.1(b)(6).)

Regulation 18746.2(b)(1)-(4) provides that appearances or communications are not restricted under the one-year ban if an individual:

“(1) Participates as a panelist or formal speaker at a conference or similar public event for educational purposes or to disseminate research and the subject matter does not pertain to a specific action or proceeding;

(2) Attends a general informational meeting, seminar, or similar event;

(3) Requests information concerning any matter of public record; or

(4) Communicates with the press.”

We have also advised that a former agency official may, without violating the one-year ban, draft proposals on a client's behalf to be submitted to the agency so long as the former employee is not identified in connection with the client's efforts to influence administrative action. (*Cook* Advice Letter, No. A-95-321; see also *Harrison* Advice Letter, No. A-92-289.) Similarly, a former agency official may use his or her expertise to advise clients on the procedural requirements, plans, or policies of the official's former agency so long as the employee is not identified with the employer's efforts to influence the agency. (*Perry* Advice Letter, No. A-94-004.)

(1) As a former employee of the DFG, what restrictions do the Act's revolving door provisions have on your ability to work as a paid employee or volunteer of the SAC?

As a former designated employee of the DFG, you are subject to the one-year ban. While the Act does not prohibit you from accepting employment with the SAC, the one-year ban does prohibit you from representing the SAC, for compensation, in any appearance or communication before your former state agency, or any officer or employee thereof, for the purpose of influencing any administrative or legislative action or any action involving the issuance, amendment, awarding, or revocation of a permit, license, grant, or contract, or the sale or purchase of goods or property for one year after you leave state service. (See Regulation 18746.2.)

More specifically, you have asked about appearances or communications on behalf of the SAC in regulatory proceedings before the FGC and sitting on the PFMC's Groundfish Advisory Panel. As detailed above the one-year ban only applies to appearances and communications before your former state agency employer. Accordingly, the one-year ban does not prohibit you from serving as the SAC's representative to the PFMC's Groundfish Advisory Panel (a federal agency), so long as you do not make an appearance or communication before your former employer.

Turning to regulatory proceeding before the FGC, a threshold task in applying the one-year ban is to identify the "state administrative agency" for which an employee has worked within the meaning of Section 87406. Generally, if a state department, office, or agency controls its own budget, personnel, and operations, it is considered to be a separate "state administrative agency" and the one-year ban extends only to that department or office. However, where control of a state department, office, or agency is intertwined with another state department, office, or agency we must consider the extent of the control one department, office, or agency has over the other in determining whether to treat the two departments, offices, or agencies as single "state administrative agency" for purposes of the revolving door provisions. (*Corum* Advice Letter, No. A-02-258.)

Pursuant to Fish and Game Code Section 703, subdivision (a), the FGC has the express authority to formulate "general policies for the conduct of the [DFG]." Moreover, the Director of the DFG "shall be guided by those policies and shall be responsible to the [FGC] for the administration of the [DFG] in accordance to those policies." The Attorney General's Office has also opined that Fish and Game Code Section 703 gives the FGC the implied power to approve or disapprove the budget of the DFG. (27 Ops.Atty.Gen 185.) As granted by Fish and Game Code Section 703, the FGC has considerable control over the budget, personal, and operations of the DFG. Accordingly, the FGC and the DFG are considered a single state administrative agency for purposes of the one-year ban. For your purposes, the one-year ban will extend to appearances or communications before either the FGC or the DFG.

In regard to volunteering for the SAC, the one-year ban applies to appearances or communications before the DFG and the FGC on behalf of the SAC only to the extent that you are compensated or promised compensation for doing so. (Regulation 18746.1(b)(3).) A payment made for necessary travel, meals and accommodations received directly in connection with any volunteer services you provide is not considered compensation for purposes of the revolving door provisions. (*Id.*) Thus, the one-year ban does not apply to appearances or communications made on behalf of the SAC, even if the SAC pays for necessary travel, meals, and accommodations, so long as you are volunteering your services. However, we do caution that should you work for SAC on a volunteer basis before the one-year ban terminates based on an agreement or understanding that you will be hired on as a paid employee after the ban terminates, this is considered "promised compensation" for purposes of the Act. As "promised compensation," the one-year ban will extend to any appearance or communications made on behalf of the SAC, even if you do not receive the compensation at the time the appearance or communication takes place.

(2) While you were officially terminated on August 29, 2012, the last day you worked for the DFG was June 22, 2012. On which date does the one-year ban commence?

The date on which an employee permanently leaves is the date on which the employee is no longer authorized to perform the duties of the employment, and the employee stops performing those duties, even if the employee continues to receive compensation for accrued leave credits. (Regulation 18746.4(a)(1).) Since you were no longer authorized to perform the duties of your employment and stopped performing those duties as of June 22, 2012, the one-year ban commences on this date and will expire on June 22, 2013, despite the fact that you were not officially terminated until August 29, 2012.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Zackery P. Morazzini
General Counsel

By: Harjeet E. Gidha
Intern, Legal Division

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